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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES POSTAL SERVICE,
Appellant,

—v.—

COUNCIL OF GREENBURGH CIVIC ASSOCIATIONS
and SAW MILL VALLEY CIVIC ASSOCIATION,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THE PIEDMONT HEIGHTS CIVIC CLUB, INC., AMERICAN CIVIL LIBERTIES UNION OF GEORGIA, NEW YORK CIVIL LIBERTIES UNION, and AMERICAN CIVIL LIBERTIES UNION, AMICI CURIAE

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INTEREST OF THE AMICI[1]

Piedmont Heights Civic Club, Inc. ("Piedmont Heights") is a Georgia nonprofit corporation formed in 1956 by residents of Piedmont Heights, a community of approximately 300 households in northeast Atlanta, Georgia. More than half of the families in the community are active participants in this civic organization.

The organization has no paid staff. All activities of the organization are carried out by volunteers. From its inception, Piedmont Heights deposited civic notices in mailboxes as its principal means of communication with residents of the community. Since most of the mailboxes in Piedmont Heights are located at curbside, leaflets can be quickly distributed by car. Leaving leaflets at the door, necessarily on foot, requires substantially more

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1. The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

person hours of effort than does distribution of civic notices to mailboxes.

In August, 1980, Piedmont Heights was notified that copies of one of its leaflets found in mailboxes had been confiscated by Postal Service officials. A fine was assessed by the Postal Service and paid by Piedmont Heights.

Subsequent to the assessment of the fine, Piedmont Heights has found that there is no satisfactory alternative to mailbox distribution. Civic leaflets left at the doors of residences are likely to be rained on, blown away, or overlooked. Subsequent to the fine, the organization has received serious criticism from its members about their failure to receive civic notices from the organization.

Because the organization has insufficient funds and resources to make use of the mails for its communications with neighborhood residents -- much less to obtain and maintain address lists -- Piedmont Heights has never

been able to use the mails for its civic communications. As a practical matter, use of the mails is frequently forclosed because of timing: notice of meetings, hearings, and other occurrences of importance to the neighborhood is often obtained too late to permit mail delivery of civic notices to residents.

Because its capacity to communicate with area residents was severely hampered, Piedmont Heights contacted pro bono counsel in late 1980. The filing of litigation was deferred when counsel became aware that this Court would hear the present case, involving the same First Amendment claims on which the Piedmont Heights' suit would have been based.

The trial court's decision in this case was limited to a holding that the statute was unconstitutional as applied to the plaintiffs below. Amici submit, however, that this Court should find the statute unconstitutional to the extent that it is construed to prohibit the use of mailboxes for communication by all

nonprofit voluntary civic organizations.[2] Although the present plaintiffs are located in a single region of the country, the witnesses at trial included a variety of representative individuals, organizations and governmental or quasi-governmental entities, both rich and poor, in urban, rural, and suburban areas. Their experience may be regarded as representative of the operation of Section 1725 throughout the country, especially in view of the nationwide unformity of design and placement of mailboxes imposed by postal regulations. The Postal Service does not contend otherwise, but, on the contrary, argued the typicality of the facts presented below as a basis for urging that probable jurisdiction be noted by this Court. Any decision of the Court should therefore recognize that, as in door-to-door

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2. Although the trial court construed the statute to bar mailbox leafletting by nonprofit civic organizations, that construction is by no means required by the language or the legislative history of Section 1725. See Section IV of this Brief, at 44-46, infra.

or sidewalk handbilling cases, the issues before the Court are not limited by the specific factual setting in which the case arose, but support a holding affecting civic associations nationwide.

The American Civil Liberties Union of Georgia and the New York Civil Liberties Union are state affiliates of the American Civil Liberties Union, a nationwide, non-partisan organization of over 200,000 members dedicated to protecting the fundamental rights of the people of the United States.

The ACLU has long supported the free speech and associational rights protected by the First Amendment. In pursuit of the ACLU's goals, ACLU attorneys have litigated and continue to litigate numerous cases involving the First Amendment.

The case sub judice has important First Amendment implications which go beyond affecting only the parties directly involved in this

litigation. Many civic organizations throughout the Nation depend upon the use of mailboxes to communicate their views and develop their associations. A decision on the merits by this Court will unquestionably affect the communication and association activities of other groups and organizations.

Because of Amici's concerns about the First Amendment issues present, and because counsel for the parties may not focus on the broader issues involved, Amici file this brief.

SUMMARY OF ARGUMENT

Nonprofit neighborhood civic associations and their members have First Amendment rights to deliver and receive civic notices and to engage in associational activity. These fundamental rights are severely abridged by Appellant's prohibition, through enforcement of 18 U.S.C. §1725, of mailbox distribution of civic notices.

Appellant has the burden of establishing a compelling governmental interest to justify

such abridgement and of showing that the restriction is narrowly tailored to serve such an interest. No such showing has been made.

None of the asserted governmental justifications for abridgement of these fundamental First Amendment rights passes constitutional muster. Appellant's chief justification is its argument that dilution of postal revenues will result from permitting civic organizations to deposit their leaflets in mailboxes. But Congress has previously exempted from the postal monopoly all delivery by private hands without compensation, leaving the issue in this case whether civic organizations may use a mailbox as the place of deposit for civic notices. Since no competition with the Postal Service is involved, Appellant's primary justification fails as a compelling interest, much less one sufficient to outweigh the infringement of First Amendment freedoms. The other asserted justifications -- mail security, overcrowding of the mailbox and

homeowner privacy interests -- are speculative at best and fall far short of the requisite governmental showing.

Amici submit that this case is subject to the compelling interest test. Yet, even if Section 1725 is considered to be a time, place, and manner regulation, the applicable First Amendment test of constitutionality is not met.

Alternatively, Amici suggest that Section 1725 can and should be construed to be inapplicable to the communication and associational activities of nonprofit neighborhood associations.

ARGUMENT

I. SECTION 1725 INFRINGES APPELLEES' PROTECTED FIRST AMENDMENTS RIGHTS

Three separate but interrelated communication rights are abridged by Section 1725: the right of Appellees to distribute information free of unnecessary restraint; the concomitant right of householders to receive the same information; and finally the associational interest to which this communication is vital.

A. Enforcement of Section 1725 Abridges Appellees' Right to Disseminate Information

This Court has long held that the distribution and circulation of pamphlets and leaflets is a protected First Amendment right. See Lovell v. City of Griffin, 303 U.S. 444, 452 (1938) ("liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets)"; see also, Organization For A Better Austin v. Keefe, 402 U.S. 415, 417 (1971) ("the activity of peaceful pamphleteering is a form of communication protected by the First Amendment"). Similarly, a long line of cases has held that the right to distribute literature and disseminate information door-to-door is protected by the First Amendment. See, e.g., Martin v. Struthers, 319 U.S. 141, 164 (1943); Schneider v. State of New Jersey, 308 U.S. 147, 152 (1939). This Court has recently reiterated the importance of door-to-door distributions. In Village of Schaumburg v. Citizens For A Better Environment,

444 U.S. 620, 636-639 (1980), an ordinance prohibiting persons from soliciting door-to-door unless 75% of the funds collected would actually be used for charitable purposes was held unconstitutional. As this Court recognized, the village's interest in preventing fraud and protecting public safety and residential privacy was insufficient to justify the ordinance's abridgement of First Amendment rights.

B. Enforcement of Section 1725 Abridges The Right Of Community Residents To Receive Information Concerning Community Affairs

The First Amendment protects the right of community residents to receive information as well as the right of community associations to distribute leaflets. This Court's decisions establish that freedom of speech "necessarily protects the right to receive information and ideas." Kleindienst v. Mandel, 408 U.S. 753, 762-763 (1972). See, e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer

Council, Inc., 425 U.S. 748, 756-757 (1976); Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 390 (1969); Stanley v. Georgia, 394 U.S. 557, 564 (1969); Griswold v. Connecticut, 381 U.S. 479, 482 (1965); Marsh v. Alabama, 326 U.S. 501, 505 (1946); Martin v. Struthers, 319 U.S. 141, 143 (1943).

The right to receive information is directly implicated when the government attempts to regulate delivery of written communication. In Procunier v. Martinez, 416 U.S. 396, 408 (1974), when considering censorship of prison inmates' mail, this Court stated:

> "Communication by letter is not accomplished by the act of writing words on paper. Rather, it is effected only when the letter is read by the addressee. Both parties to the correspondence have an interest in securing that result, and censorship of a communication between them necessarily impinges on the interest of each. Whatever the status of a prisoner's claim to uncensored correspondence with an outsider, it is plain that the latter's interest is grounded in the First Amendment's guarantee of freedom of speech."

This principle was also applied in Lamont v. Postmaster General, 381 U.S. 301 (1965), where this Court struck down a postal regulation which restricted a citizen's right to receive mail sent from outside the country. The recipient's First Amendment guarantees protected his right to receive his mail without governmental interference.

C. Enforcement of Section 1725 Abridges The Associational Right Of Civic Organizations And Members

The First Amendment also protects the associational rights of civic association members. A neighborhood civic association cannot organize or continue without the ability to communicate. Circulating leaflets, house-to-house, is an essential means by which individuals may ban together with other like-minded residents. Furthermore, the ability to distribute information is essential to the function of informing neighborhood residents of meetings, events, and issues of public concern. An

association cannot exist if it is unable to distribute information to all households within the community in a prompt, effective and unburdened manner.[3]

This Court has repeatedly held that the First Amendment protects associational rights of citizens. See, e.g., Elrod v. Burns, 427 U.S. 347 (1976); Buckley v. Valeo, 424 U.S. 1 (1976); N.A.A.C.P. v. Button, 371 U.S. 415 (1963); Bates v. City of Little Rock, 361 U.S. 516 (1960); N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958); Thomas v. Collins, 323 U.S. 516 (1945); DeJonge v. Oregon, 229 U.S. 353 (1937). The First Amendment protects freedom of association not only against direct abridgement, but also against governmental limitations that burden its exercise. Id.

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3. The trial court found that plaintiffs' organizational activities, including their ability to alert their constituencies to local governmental meetings and other activities, had been significantly curtailed, and there was a likelihood that some of the plaintiffs might be forced out of existence by the enforcement of the statute. 490 F.Supp. at 163.

D. Enforcement Of Section 1725 Strikes At The Heart Of First Amendment Freedoms

Appellees' leaflets communicate issues of neighborhood, and therefore public, importance. Discussion of public issues is clearly "at the heart of the freedom to speak," Consolidated Edison Co. v. Public Service Commission, 65 L.Ed.2d 319, 326 (1980), thereby ranking high among the freedoms specially protected by the First Amendment. See Carey v. Brown, 65 L.Ed.2d 263, 273 (1980).

Free discussion of such issues, the cornerstone of our liberty, is involved here in three distinct but inseparable ways: Appellees' freedom to distribute literature is unduly restricted; neighborhood residents' right to receive communication is abridged; and, the associational rights of all are undercut.

These intertwined interests cannot be abridged absent compelling governmental interests. As discussed below, Appellant fails to show a sufficient interest, whatever First Amendment test is applied.

II. THE STATUTE'S RESTRICTION OF APPELLEES' FIRST AMENDMENT RIGHTS IS NOT A NARROWLY TAILORED MEANS OF SERVING A COMPELLING GOVERNMENTAL INTEREST

A. Appellant's Ban On Use Of Mailboxes Requires Application Of The Compelling Interest Test

Amici submit that the appropriate First Amendment test to resolve the issue presented in this appeal is the compelling interest test most recently summarized by this Court in Consolidated Edison Co. v. Public Service Commission, 65 L.Ed.2d 319, 330 (1980):

> "Where a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest. See First National Bank of Boston v. Bellotti, 435 US, at 786, 55 L Ed 2d 707, 98 S Ct 1407; Buckley v. Valeo, 424 US 1, 25, 46 L Ed 2d 659, 96 S Ct 612 (1976) (per curiam). See, also Bates v. Little Rock, 361 US 516, 524, 4 L Ed 2d 480, 80 S Ct 412 (1960)"

This Court has further held that the gain to the subordinating interest must outweigh the incurred loss of protected rights and be

narrowly drawn. Elrod v. Burns, 427 U.S. 347, 362 (1976).

Appellant argues, to the contrary, that the applicable First Amendment test is whether the asserted content-neutral regulation of the time, place, and manner of exercising First Amendment rights serves a significant governmental interest and ample alternative means of communication remain. Appellant's Brief, at 13-14, 19-22. Section 1725 is not, however, a regulation of the time, place, and manner of exercising First Amendment rights. It is a total ban, for all time, on the exercise of those rights with regard to the principal means of distributing civic notices and leaflets. Appellees and other citizens similarly situated are flatly prohibited, under threat of criminal penalty, from using the mailbox as a method of communicating information and ideas, unless they place adequate postage on the leaflets. The Appellant's "regulation" argument runs afoul of this Court's admonition in Grayned v.

City of Rockford, 408 U.S. 104, 117 (1972), that "free expression 'must not, in the guise of regulation, be abridged or denied.'"

Section 1725's prohibition on one method of communication is indistinguishable from the prohibitions on methods of communication invalidated by this Court in Martin v. Struthers, supra, and Schneider v. State of New Jersey, supra. In both Martin and Schneider, this Court struck down ordinances prohibiting communication by door-to-door solicitation, even though other alternative means of communication remained. In Schneider this Court also held unconstitutional ordinances prohibiting communication by distributing leaflets on public sidewalks. This Court refused to accept the governmental argument that the challenged prohibitions represented merely regulations of the time, place, and manner of exercising protected First Amendment rights. The prohibitions in Martin and Schneider are directly analogous to the prohibition of Section 1725. Each prohibition represents a ban on a particu-

lar method or locus of communication and none of the prohibitions is accurately characterized as a mere regulation of time, place, or manner.[4]

B. Appellant Failed To Carry Its Burden Of Proof That Section 1725's Prohibition Represents A Compelling Governmental Interest.

Restrictions on free speech may be justified only if the government proves that the subordinating interests are compelling, and that the restrictions result from a statute narrowly tailored to satisfy that interest. Appellant here seeks to justify its abridgement of First Amendment rights by asserting four governmental interests: (1) postal service revenues; (2) mail security; (3) avoiding mailbox overcrowding; and (4) postal customers' privacy.

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4. Appellant concedes in its Brief, at 15-16 n.10, that Martin and Schneider involved general bans on communication methods but, without any supporting argument or rationale, concludes that "[n]o such general ban on a method of communication is at stake here." For the reasons asserted above, Appellant's feeble attempt to distinguish Martin and Schneider fails. See also Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557-58 (1975) (a ban on access to a place of communication equals a prior restraint).

Appellant's Brief, at 20-22. Upon examination, none of these asserted justifications constitutes a compelling governmental interest sufficient to justify the substantial abridgement of First Amendment rights resulting from the application of Section 1725.[5]

1. Speculative Revenue Losses Are Not A Compelling Governmental Interest

Appellant's chief argument justifying Section 1725 is that it "is designed to prevent the dilution of revenues through the private delivery of unstamped mailable matter." Appellant's Brief, at 20. Appellant argues that mailbox leafletting by Appellees dilutes postal revenues. This argument does not apply in the present case.

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5. The findings of fact of the trial court on these issues are conclusive unless clearly erroneous. Rule 52(a), Fed. R. Civ. P. Appellant makes no explicit effort in its Brief to show clear error. This failure to establish that the findings are clearly erroneous requires affirmance. However, Amici further submit that the asserted justifications are inadequate as a matter of law, and that any ruling of this Court should extend to all similar organizations.

Appellees' mailbox distribution does not undercut expected Postal Service revenue. Appellant concedes that leaflets could be distributed in other locations, e.g., placed under doors or doormats, hung on doorknobs, tacked to a door post, or taped to the post on which the letter box rests.[6] Appellant's Brief, at 15. Thus, the issue here is neither Appellees' conveyance of handbills, nor postal revenues, but only the deposit of leaflets in the mailbox without postage.

A fatal flaw in Appellant's revenue dilution argument is that Congress has already created an exemption for distribution of leaflets such as those involved here. The Private Express Statutes,[7] reflecting a congressional

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6. The trial court held that none of these alternatives was particularly effective and that Appellant's restriction on mailbox delivery accordingly "constitutes a serious burden on [Appellees'] ability to communicate with their constituents." 490 F.Supp. at 160.

7. 39 U.S.C. §§601-606; 18 U.S.C. §§1693-1699.

policy to preserve the commercial monopoly of the federal postal system, not only prohibit competition in the conveyance of mailable materials but also contain an exemption for organizations such as Appellees.

> "This chapter shall not prohibit the conveyance or transmission of letters or packets by private hands without compensation, or by special messenger employed for the particular occasion only . . . ." 18 U.S.C. §1696(c) (emphasis added).

In other words, Congress has already recognized that the purpose of the postal monopoly[8]

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8. The purpose of the Private Express Statutes is not simply to protect the government's postal revenues. Rather, it is to prevent erosion of significant cost-spreading mechanisms by prohibitting commercial competition in local or other specialized markets where costs are cheaper than the national average. See Associated Third-Class Mail Users v. United States Postal Service, 600 F.2d 824, 826-7 (D.C.Cir. 1979):

> "For example, the cross-subsidization inherent in establishment of uniform rates regardless of distance for each class of sealed mail pursuant to 39 U.S.C. 3623(d) (1976) is inconsistent with a fully competitive market, as is the decision to locate post offices in some out-of-the way places."

[footnote continued on next page]

is not affected by permitting some postage-free distribution. Since Appellees' leaflets are carried by volunteers, 490 F.Supp. at 160, the statutory exemption for delivery by "private hands without compensation" clearly applies to the leaflet distribution activities of such civic organizations. Congress has expressly authorized Appellees' distribution without payment of postage. The only question remaining is where leaflets may be left. In this context, the trial court was surely correct in rejecting Appellant's contention that postal revenues are or would be affected by Appel-

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[footnote continued from previous page]

See also Blackham v. Gresham, 16 Fed. 609 (S.D.N.Y. 1883); National Association of Letter Carriers v. Independent Postal System, 470 F.2d 265 (10th Cir. 1972) (upholding broad definition of "letter").

Appellant's reliance on the foregoing decisions in the present action is misplaced. All of those cases were decided not under Section 1725, but under the Private Express Statutes and involved commercial competition with the Postal Service. Furthermore, none of those cases decided First Amendment issues.

lees' means of communicating.[9]

Appellant's dilution of revenue argument is further undermined by the numerous exemptions, allowing distribution without postage, created by Appellant's own administrative definition of the term "letter." 39 C.F.R. Part 310. These exemptions include labels, legal documents, telephone directories, catalogues of twenty-four pages or more, stationery, photographic materials to or from the processor, checks, telegrams, computer programs, and a variety of other classes of communications. Appellant has also suspended the Private Express Statute, under 39 C.F.R. Part 320, for university mail systems and "urgent letters." These exemptions and suspensions demonstrate that, notwithstanding the asserted monopoly interest,

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9. The district court found that certain organizations were unable to distribute following enforcement of Section 1725. 490 F.Supp. at 163. Although the Postal Service is not required to subsidize non-profit organizations, the First Amendment prohibits it from justifying the abridgement of free speech rights on dilution of revenue grounds when the effect of Section 1725 is to put an end to dissemination of leaflets by neighborhood civic organizations.

a wide variety of materials may be carried without postage. These exemptions dilute the Postal Service revenues; yet, such dilution is permitted even though Appellees' First Amendment rights are of a higher order.[10]

Appellant concedes, as it must, that the source of its monopoly power is only a proprietary function and not an exercise of police power. Appellant in this case has acted only as the "proprietor of a particular economic enterprise, the postal system." Appellant's Brief, at 15-16 n.10. This proprietary function, however, is not a compelling governmental interest.

Through the enforcement of Section 1725, Appellant imposes a user fee or license tax on Appellees' use of mailboxes. See Appellant's

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10. The existence of such exemptions and suspensions demonstrates that a more narrowly tailored statute would protect the postal service's interest in its monopoly as well as would the complete prohibition of Section 1725.

Brief, at 15-16 n.10. Since that use does not require postal services, the postage fee for deposit of a civic leaflet bears no relationship to governmental expenses.[11] A license tax unrelated to the costs of services is proscribed where First Amendment rights are abridged. See, e.g., Murdock v. Pennsylvania, 319 U.S. 105, 113 (1943) ("the power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this Court has repeatedly struck down.")

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11. Appellant asserts that a piece-by-piece examination of all items placed in mailboxes by civic organizations would be burdensome and costly to the Postal Service. The district court rejected this argument because it found that examination of items in the mailbox is a routine part of a postal worker's duties necessary to identify items such as outgoing letters. 490 F.Supp. at 162-63. As the district court also recognized, the postal worker who has reviewed an example of a civic organization leaflet at one mailbox can easily recognize at a glance identical leaflets found in other boxes in the neighborhood. Id.

Furthermore, this Court has long held that any marginal additional effort required in the performance of normal governmental functions such as law enforcement, street cleaning and mail delivery, is simply the cost of having a society in which free speech is permitted and cannot justify an abridgement of that right. See, e.g., Martin v. Struthers, 319 U.S. 141, 143 (1943); Schneider v. State of New Jersey, 308 U.S. 147, 162 (1939).

In summary, no compelling interest based on Appellant's revenue argument has been shown.

2. Speculative Concerns About Security Of The Mails Are Not A Compelling Governmental Interest.

Appellant also asserts that Section 1725 "plays a role in protecting the security of the mails from theft and tampering." Appellant's Brief, at 21. The district court found that failure to enforce Section 1725 against civic organizations would not cause a "significant reduction in the government's ability to protect the mails by investigating and prosecuting mail theft, mail fraud, or unauthorized mail delivery service," 490 F.Supp. at 163, especially in view of the existence of other specific statutes prohibiting unlawful activities.[12]

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12. The Criminal Code provides the necessary protection for security of the mails. See, e.g., 18 U.S.C. §§1341, 1708. Moreover, this approach represents the narrow tailoring of governmental regulations where First Amendment rights are involved. See, e.g., Elrod v. Burns, 427 U.S. 347, 363 (1976); Grayned v. City of Rockford, 408 U.S. 104, 119 (1972).

As Judge Kaufman observed when the initial dismissal of this case was reversed by the Second Circuit, Section 1725 does not prohibit private citizens from depositing mail bearing postage. 586 F.2d 935, 938 (2d Cir. 1978). The same opportunity for theft exists in this situation as when citizens deposit unstamped leaflets.

In short, Appellant's security and prevention of fraud arguments are indentical to those previously rejected by this Court in Martin v. Struthers, 319 U.S. 141, 148 (1943); and in Village of Schaumburg v. Citizens For A Better Environment, 444 U.S. 620, 638-39 (1980). They are equally unpersuasive in this case.

3. Speculative Concerns About Overcrowding In The Mailbox Are Not A Compelling Governmental Interest.

Appellant further seeks to justify its enforcement of Section 1725 on the ground that it protects against mailbox overcrowding. The

district court correctly found this claim to be unsupported and speculative. 490 F.Supp. at 161, 163. Certainly, Appellant's unsubstantiated assertion cannot outweigh the substantial infringement of Appellees' First Amendment rights. Even if such a showing had been made, the narrow tailoring requirement imposes a duty to protect its minimal interest in preventing mailbox clutter with carefully drawn measures, e.g., restriction on the size of materials left in the mailbox. The complete ban on any use of the mailbox, foreclosing an important channel of communication, cannot be justified by a hypothetical concern about overcrowding.

4. Asserted Homeowner Privacy Interests Are Not A Compelling Governmental Interest.

Appellant argues, as one further justification for Section 1725, that enforcement of the statute protects the privacy interests of homeowners. Appellant asserts that the homeowner expects that no one other than members

of his household and postal employees will look into his mailbox. It should be noted at the outset that concern for homeowner's privacy interests is not evident from the statutory scheme, given an exception for stamped materials which cuts directly against Appellant's assertion.

The district court rejected Appellant's privacy arguments because (1) Appellant did not have standing to raise the privacy interests of homeowners, and (2) homeowners are free to protect their own interests by posting no trespassing signs and by enforcing local trespass laws. 490 F.Supp. at 163 n.3. This ruling simply applied prior holdings of this Court. In Martin v. Struthers, 319 U.S. 141, 143-44 (1943), Justice Black, in discussing the power of a community to restrict door-to-door distribution of leaflets by statute, observed that the ordinance at issue "does not control anything but the distribution of literature, and in that respect it substitutes

the judgment of the community for the judgment of the individual householder." Such substitution of judgment, the Court held, was impermissible because homeowners can protect their privacy interest by enforcement of the trespass laws. The Court thus concluded that the decision whether to receive information must rest with the individual homeowners rather than the Government. Accord, Lamont v. Postmaster General of the United States, 381 U.S. 301 (1965); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Schneider v. State of New Jersey, 308 U.S. 147 (1939).

More recently, in Consolidated Edison Co. v. Public Service Commission, 65 L.Ed.2d 319 (1980), this Court stated that the recipient's privacy interest in not receiving an unwanted notice inserted in his electric bill could be adequately served by transferring the notice to the wastebasket and that such an asserted interest could not justify the imposition of a prior restraint on communications. See also

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553-58 (1975).

Furthermore, this Court has repeatedly upheld the First Amendment right of door-to-door soliciting against claims that the home-owner's privacy and security is thereby invaded. See, e.g., Schaumberg and Martin. No real dispute exists that the invasion of privacy associated with receiving a leaflet in the mailbox is far less intrusive than that involved in door-to-door solicitation. Indeed, residents desiring to receive civic notices concerning their neighborhoods are quite likely to find such notices far less intrusive than many of the postage-paid commercial advertisements which appear in their mailboxes.

Appellant's privacy justification for Section 1725 is no different than the privacy defenses which this Court has previously rejected. The government's asserted blanket interest in protecting a uniform privacy interest collapses as soon as it is realized

how different those interests are. Some householders want information and the First Amendment protects their right to receive it. See discussion, supra, at 10-12. Appellant may not substitute its judgment for that of the individual. If an individual homeowner's privacy interests are affected, he or she may exercise the right to decide what information to receive by informing a civic association that he or she no longer desires to receive flyers, or by posting no trespassing signs. In this way, each individual remains free to exercise his own judgment as to whether to receive information. Narrow tailoring requires no less.[13]

In conclusion, Appellant has failed to demonstrate that any of the concerns raised in

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13. Indeed, Congress has already provided a more narrowly tailored remedy for invasions of personal privacy by making it a criminal act for any person to take correspondence from a mailbox "with design to obstruct the correspondence, or to pry into the business or secrets of another." 18 U.S.C. §1702.

its Brief amount to a compelling interest sufficient to justify an abridgment of the First Amendment rights of civic associations and their constituents. This failure to satisfy the compelling interest test should be the beginning and the end of this case. However, since Appellant stresses so heavily the "time, place and manner" test, Amici also will address that standard.

III. ALTERNATIVELY, APPELLANT HAS FAILED TO CARRY ITS BURDEN OF PROOF UNDER THE TIME, PLACE, AND MANNER TEST TO JUSTIFY ABRIDGMENT OF APPELLEES' FIRST AMENDMENT RIGHTS.

This Court's time, place and manner test has several elements. The governmental regulation must be content-neutral, the regulation must be reasonable as this Court has defined that term,[14] there must be ample alternatives

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14. In Grayned v. City of Rockford, 408 U.S. 104 (1972), this Court defined "reasonableness":

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available if no public forum is involved,[15] the subordinating governmental interest must be significant,[16] and the regulation must be narrowly tailored.[17]

This test involves two variations depending upon the nature of the forum. Where a "public forum" is involved, the question of

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> "The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time. Our cases make clear that in assessing the reasonableness of a regulation we must weigh heavily the fact that communication is involved, the regulation must be narrowly tailored to further the State's legitimate interests." 408 U.S. at 116-117 (footnotes omitted).

See also Schneider v. State of New Jersey, 308 U.S. 147, 161 (1939).

15. Consolidated Edison Co. v. Public Service Commission, 65 L.Ed.2d 319, 327 (1980).

16. Grayned v. City of Rockford, 408 U.S. 104, 115-116 (1972).

17. Carey v. Brown, 65 L.Ed.2d 267, 270 (1980); Grayned v. City of Rockford, supra, 408 U.S. at 116-117; Elrod v. Burns, 427 U.S. 347, 362-363 (1976); Police Department v. Mosley, 408 U.S. 92, 101 (1972).

adequacy of other alternatives is irrelevant to the First Amendment analysis.[18] Schneider v. State of New Jersey, 308 U.S. 147, 163 (1939); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 556 (1975). Where a non-public forum is involved, the single additional element of the applicable test permits a court to consider a governmental showing of the presence or absence of ample and adequate alternatives. Consolidated Edison Co. v. Public Service Commission, 65 L.Ed.2d 319, 326 (1980).

Amici submit that the mailbox represents, for the purpose of the First Amendment analysis,

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18. The existence of different standards depending upon the presence of a given factor, such as a public forum, is consistent with this Court's First Amendment principles. This Court has maintained different First Amendment tests for different factual situations: commercial speech, Central Hudson Gas v. Public Service Commission, 65 L.Ed.2d 341, 348-349 (1980); national defense interests, Brown v. Glines, 444 U.S. 348, 354-355 (1980); expressive conduct, Cox v. Louisiana, 379 U.S. 536 (1965); state educational institutions, Grayned v. City of Rockford, 408 U.S. 104, 117-18 (1972); obscenity and youth, Erznoznik v. City of Jacksonville, 422 U.S. 205, 213-14 (1975); prisoners' speech rights, Jones v. North Carolina Prisoners' Union, 433 U.S. 119, 129-30 (1971).

a public forum. As Appellant states in its brief: "The very existence of letter boxes, after all, depends on the Postal Service." Appellant's Brief, at 18. Not only is the mailbox thus a creation of the federal government, but, as this litigation dramatically illustrates, the Postal Service exercises plenary control over its use through the criminal law. See, e.g., 18 U.S.C. §1725. Because it is government created and controled, the mailbox is dedicated to the public use. As this Court has repeatedly observed, "the use of the mails is almost as much a part of free speech as the right to use our tongues." Blount v. Rizzi, 400 U.S. 410, 416 (1971), quoting from United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U.S. 407, 437 (1921) (Holmes, J. dissenting).[19]

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19. See also Lamont v. Postmaster General, 381 U.S. 301, 305 (1965); Procunier v. Martinez, 416 U.S. 396, 422 (1979) (Marshall, J. concurring).

The mailbox represents a forum which has traditionally been used as a means of communicating through distribution of printed material. As such, mailboxes are "natural and proper places for the dissemination of information and opinion,"[20] and are a forum presumptively open to free speech unless some basic incompatibility justifies regulation.[21] The leafletting activity of civic organizations using the mailbox is not one inherently incompatible with or one which "frustrates"[22] the normal activity of the forum, i.e., the deposit of written communication in a receptable. On the contrary, Appellees' activity is identical with the normal activity of the forum. As the district court found, the deposit of leaflets

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20. Schneider v. State of New Jersey, 308 U.S. 147, 163 (1939).

21. Grayned v. City of Rockford, 408 U.S. 104, 116 (1972). Compare Rowan v. United States Post Office Department, 397 U.S. 728 (1970).

22. Consolidated Edison Co. v. Public Service Commission, 65 L.Ed.2d 319, 327 (1980).

in a mailbox is wholly consistent with the normal function of the mailbox in the postal system's operation. 490 F.Supp. at 163.

Amici recognize that the mailbox, unlike wholly public fora such as public sidewalks and parks, is a hybrid. It is governmentally created, controlled and regulated. It serves a use dedicated to the public. Yet, as Appellant notes, technical ownership of the mailbox is private. However, the degree of private citizen control over the mailbox is extraordinarily circumscribed under existing postal regulation. For example, under Appellant's interpretation of Section 1725, a homeowner does not have the right to give a civic association permission to place unstamped circulars in his mailbox. Similarly, except in very limited circumstances, see Rowan, the mailbox owner may not refuse to receive material sent through the mail. His remedy for unwanted mail is to transfer it, after receipt, to the wastebasket. See Consolidated Edison Co. v.

Public Service Commission, 65 L.Ed.2d 319, 331 (1980).

Therefore, Amici submit that the mailbox is most closely aligned with the indicia of public fora which have been articulated in this Court's decisions. Given a public forum, the adequacy of alternatives is not relevant to the judicial inquiry. For the reasons set forth, supra, at 15-33, Appellant has failed to establish that its enforcement of Section 1725 serves any significant governmental interest or that it has narrowly tailored its regulation of important First Amendment rights.

Even if this Court were to conclude that the mailbox is not a public forum, Appellant has still failed to carry its burden of proof. The requirements of showing significant governmental interest, reasonableness, and narrow tailoring are the same as in a public forum case. The only additional consideration in the nonpublic forum circumstance is the adequacy of alternatives. The district court found

that door delivery and similar asserted alternatives were not adequate. 490 F.Supp. at 163. As a practical matter, householders reasonably anticipate that incoming messages will be found in the mailbox. This case presents a situation where the effectiveness of the message depends in great measure upon how it is conveyed. See Young v. American Mini Theaters, Inc., 427 U.S. 50, 78 n.2 (1976) (Powell, J. concurring). As in Linmark Associates, Inc. v. Willingboro, 431 U.S. 85 (1977), even if other means of communication were equally convenient to use and no more costly, they are less effective in reaching their intended audience and are unsatisfactory alternatives for that reason.[23]

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23. In Linmark, this Court stated: "[S]erious questions exist as to whether the ordinance 'leave[s] open ample alternative channels for communication.' . . . Although in theory sellers remain free to employ a number of different alternatives, in practice realty is not marketed through leaflets, sound trucks, demonstrations, or the like. The options

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Whether or not the Court finds the public aspects of the mailbox to be predominant, Section 1725 is not a reasonable time, place, or manner regulation. As previously discussed, Appellant has not carried its burden of showing a substantial governmental interest justifying abridgement of First Amendment rights.

Furthermore, there is no showing that enforcement of the statute actually serves the interests asserted by the government. Distribution of civic leaflets by organizations which do not use the mails can have no appreciable effect on Appellant's commercial monopoly. Appellant has not shown that enforcement of

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> to which sellers realistically are relegated -- primarily newspaper advertising and listing with real estate agents -- involving more cost and less autonomy than 'For Sale' signs; . . . are less likely to reach persons not deliberately seeking sales information, . . . and may be less effective media for communicating the message that is conveyed by a 'For Sale' sign in front of the house to be sold. . . . The alternatives, then, are far from satisfactory." 431 U.S. at 93 (citations omitted).

Section 1725 results in greater security of the mails against theft or fraud than is provided by existing narrowly drawn statutes prohibiting those offenses. There has been no credible showing that civic leaflets will impose any undue burden on postal workers or the mail system by overcrowding the box or otherwise. As this Court held in Bates v. City of Little Rock, 361 U.S. 516 (1960), where First Amendment rights are abridged, the Court must look beyond the asserted purpose of a statute and determine whether the abridgement actually serves a significant governmental interest which cannot be accomplished without infringing on protected liberties.

Section 1725 is further not "reasonable" under the standards set forth in Grayned and Consolidated Edison because civic leafletting is not an inherently incompatible activity which frustrates the usual activity of the

forum. The justification of the reasonableness of a time, place, and manner regulation must rest on a need to accommodate competing values. But no such need exists in the present case.

Although Amici believe that the pulbic forum aspects of the mailbox predominate, Appellant's position is no stronger if the box is deemed a nonpublic forum. Indeed, to the extent that mailboxes are considered to be private, the householder's right to receive civic messages and to determine for himself what communications he desires, as well as his associational rights to band together with his neighbors for civic purposes should weigh even more heavily.

Finally, the absence of any satisfactory alternative has been dramatically demonstrated in the court below. Where communication with residents is choked off, many voluntary non-profit civic associations cease to exist. The First Amendment rights of members of such groups to distribute and receive communications,

to peaceably assemble to petition the government, and to associate for other civic purposes are severely abridged by enforcement of the statute.

IV. SECTION 1725 DOES NOT APPLY TO NONPROFIT CIVIC ORGANIZATION LEAFLETS, AND THEREFORE DOES NOT BAR APPELLEES' USE OF THE MAILBOX

Amici suggest that this Court need not reach the constitutional issues raised here. This is because Section 1725 can be interpreted to allow the Appellees to use the mailbox despite the ban on use by other parties.

The legislative history of Section 1725 indicates that it was aimed at prohibiting the use of private delivery by commercial enterprises in competition with the postal service. The sponsors were especially concerned with the hand delivery of bills by "[b]usiness concerns, particularly utility companies." See, H.R. Rep. No. 709, 73d Cong., 2d Sess. 1 (1934); S. Rep. No. 742, 73d Cong., 2d Sess. 1 (1934). The language of the statute, itself, prohibits

the deposit of "statements of accounts, circulars, sale bills, or other like matters" without payment of postage. This choice of terminology seems calculated to encompass only commercial communications and not leaflets concerning public issues which pose no competitive threat to the postal service.

In construing Section 1725, this Court should recognize that leaflets delivered by unpaid volunteers are outside the reach of its companion statute, 18 U.S.C. §1696, which is also designed to protect the postal monopoly. The express exception of §1696(c) indicates a congressional intent to exclude noncommercial leafletting from its statutory scheme for enforcement of the postal monopoly under 18 U.S.C. §§1696 and 1725.

It is appropriate for this Court to construe the statute so as to avoid even a serious question as to whether it is constitutional, Crowell v. Benson, 285 U.S. 22 (1932), especially where such a construction is clearly in accord

with the congressional intent as established by the legislative history. Furthermore, a constitutional issue should be avoided where a case may be decided on statutory grounds. Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).[24] Amici submit, therefore, that the decision below should be affirmed on the ground that the statute does not apply to the leaflets of non-profit civic organizations such as Appellees.

CONCLUSION

For the foregoing reasons, the decision of the district court should be affirmed and Section 1725 should be declared unconstitutional insofar as it prohibits mailbox distribution by

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24. Additionally, criminal statutes -- such as Section 1725 -- should be narrowly construed, and a legislative intention to reach conduct not clearly proscribed should not be implied. Bifulco v. United States, 65 L.Ed.2d 205, 219 (1980); Adamo Wrecking Co. v. United States, 434 U.S. 275, 285 (1978).

nonprofit neighborhood associations or, alternatively, should be held inapplicable to the mailbox distribution of leaflets by such civic organizations.

Respectfully submitted,

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